Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12028/2018**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On the 8 September 2022	**On the 12 October 2022**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

AJR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Coyte, Seren Legal Practice
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. This is the decision of the Upper Tribunal remaking the decision of the First-tier Tribunal (Judge Lever) which was set aside by my decision dated 25 June 2019 (sent on 27 June 2019).

3. The delay in remaking the decision arises from a combination of the COVID-19 pandemic and awaiting the country guidance decision of the Upper Tribunal in SMO and KSP (Civil status documentation; article 15) CG Iraq [2022] UKUT 110 (IAC) ("SMO 2").

Background

4. The appellant is a citizen of Iraq who was born on 28 December 1996. He is Kurdish and comes from the city of Mosul in the Nineveh Governorate in the north of Iraq.

5. The appellant arrived in the United Kingdom clandestinely on 6 July 2015. On 12 July 2015, he claimed asylum. On 4 September 2018, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

6. The appellant appealed to the First-tier Tribunal. In a determination sent on 6 February 2019, Judge Lever dismissed the appellant's appeal on all grounds. On 12 March 2019, the First-tier Tribunal (Judge O'Garro) granted the appellant permission to appeal.

7. The appeal was listed before the Upper Tribunal on 13 June 2019. In a decision dated 25 June 2019, I set aside Judge Lever's decision on the basis that it involved the making of an error of law. First, I concluded that the judge's adverse credibility finding, and his findings that the appellant had not established that he was gay and, as a consequence, at risk of persecution as a result of his sexual orientation or any perception of his sexual orientation, stood. Therefore, Judge Lever's decision to dismiss the appellant's appeal on asylum grounds stood. Secondly, the judge's finding, based upon the then country guidance, that the appellant faced an Art 15(c) risk in Mosul was not challenged and stood. Thirdly, however, the judge had erred in finding that the appellant could internally relocate to the IKR and in concluding that the appellant could obtain a replacement CSID through his family in Iraq (which the judge found he had not lost contact with) or from the Iraqi Embassy in the UK.

8. The appeal was adjourned to a future date when the decision could be remade in relation to Art 15(c) and Art 3 based upon any risk arising to the appellant if he did not have an ID document such as a CSID on return to Iraq and whether he could internally relocate to the IKR.

9. The resumed hearing was initially listed on 7 July 2020. That hearing could not go ahead due to the lack of an appropriate interpreter being available. However, at that hearing, Ms Rushforth, who then also represented the Secretary of State, indicated that she wished to reopen the issue of whether the appellant was at risk in his home area of Mosul under Art 15(c) given the change in country guidance since Judge Lever's decision in the cases of SMO and others (Article 15(c); identity documents)

Iraq CG [2019] UKUT 400 (IAC) ("SMO 1") and SMO 2. The basis of that submission was that under the current country guidance there was no longer, in effect, a presumption that, as a "contested area", in Mosul there was a real risk of indiscriminate violence to citizens in general.

10. At that hearing, Mr Coyte objected to Ms Rushforth's application and relied on the fact that, in my earlier error of law decision, I had indicated that Judge Lever's finding in relation to the existence of an Art 15(c) risk in Mosul would be preserved. I heard detailed oral submissions from both Ms Rushforth and Mr Coyte at that hearing.

11. Following that hearing, I issued a decision on this preliminary issue which can be found in the Annex to this decision. In summary, my decision was that the findings made by Judge Lever, in respect of the risk to the appellant under Art 15(c) in his home area and that, because this was an issue contested by Mr Coyte in response to Ms Rushforth's submissions, the appellant had not lost contact with his family in Mosul, should stand as findings of fact as to the circumstances at the date of Judge Lever's decision on 6 February 2019. However, for the reasons I gave in my preliminary ruling, I indicated that the parties could seek to establish at the resumed hearing that the factual situation had changed since Judge Lever's decision: (a) as to whether there was now an Art 15(c) risk to the appellant in his home area and (b) that the appellant had lost contact with his family subsequent to Judge Lever's decision. Otherwise, the facts as found by Judge Lever at the date of his decision, were to stand.

The Hearing

12. The hearing was conducted on a hybrid basis. Both the representatives and appellant, who gave oral evidence, were present in court. However, the interpreter joined the hearing via CVP.

13. In addition, I heard oral submissions from both representatives and Mr Coyte relied upon a detailed skeleton argument.

14. In his oral submissions and skeleton argument, Mr Coyte referred me to various documents contained in the appellant's bundle prepared prior to the 7 July 2022 hearing. In particular, he referred me to the appellant's witness statement dated 14 June 2022 (at pages 1 – 4 of the bundle) and a photograph of the appellant's left arm showing a tattoo "Ali R" (page 5 of the bundle). In addition, Mr Coyte referred me to a number of *CPINs* in relation to Iraq in particular: "Iraq: internal relocation, civil documentation and returns" (July 2022) (not in bundle); "Iraq: Sexual Orientation and gender identity expression" (September 2021); "Iraq: Religious Minorities" (July 2021).

15. However, Mr Coyte did not refer me to, and he placed no reliance upon, the country expert report of Dr Fatah and his addendum report dated respectively 21 November 2019 (at pages 29 – 44 of the bundle) and 24 February 2020 (at pages 9 – 28 of the bundle). These reports focus largely upon the identity document issue, in particular obtaining a replacement document, which as a result of Ms Rushforth's position at the hearing, did

not arise as she accepted a replacement CSID or INID could not be obtained by the appellant before returning to his home area in Mosul.

The Issues

16. At the outset of the hearing, the representatives identified the issues that remained to be determined.

17. First, Judge Lever's adverse credibility finding, and his findings that flowed from that, including that the appellant had not established that he is gay or that he would be perceived as being gay, were preserved and stood.

18. Secondly, the appellant's claim to be at risk because of his father's involvement with the Ba'ath Party, had been found not to be credible and also were preserved and stood.

19. Consequently, the appellant's appeal, which had been dismissed on asylum grounds, stood.

20. Thirdly, Judge Lever's finding that, as at the date of his decision, the appellant had not lost contact with his family in Mosul, also was preserved and stood.

21. Fourthly, the appellant relied upon Art 3 on the basis that he would not be able to obtain his CSID from his family in Iraq and could not obtain a replacement ID document either through his family in Iraq or from the UK embassy.

22. As regards a replacement INID or CSID, Ms Rushforth accepted on the basis of the current evidence that the appellant's home CSA office now only issued INIDs. She accepted that the appellant could not obtain an INID without being present at the CSA office and so could not obtain one in the UK. Further, because his CSA office only issued INIDs, she accepted that the appellant could not obtain a CSID through the Iraqi Embassy in the UK.

23. The issue between the parties was whether, on the facts, it was established that the appellant could obtain his original CSID which he had left with his family in Iraq and, it was said by the respondent, he could obtain from his family, with whom he continued to be in contact, before arriving in Iraq.

24. In relation to that latter matter, Ms Rushforth did not rely on the appellant obtaining his CSID by his family bringing it to Baghdad, where he would be returned, but rather that it could be sent to him in the UK by post.

25. Mr Coyte did not accept that the appellant was now in contact with his family, that his CSID could still be obtained given what had happened in Mosul, or that his family would be able to post it to him in the UK in any event.

26. Fifthly, the appellant contended that he was at real risk of serious harm in his home area under Art 15(c) applying the 'sliding scale' after SMO 2. He relied upon a number of factors: being a Sunni Muslim and Kurd, his

westernisation including a tattoo on his arm and that he no longer pursued his Muslim faith. He also contended that this risk also arose at Shia militia checkpoints between Baghdad and Mosul given that the Shia militia would question him and he would have to answer truthfully, in the light of HJ (Iran) v SSHD [2010] UKSC 311, the basis upon which he had claimed asylum in the UK including his claim that he was gay and his father's claimed Ba'ath Party past.

27. Finally, if the appellant were at risk in his home area of Mosul, Ms Rushforth accepted that he could not internally relocate to the IKR if the risk to him in Mosul arose, inter alia, from any perception of him arising from his tattoo or otherwise. But not, she submitted, if the risk simply arose on the basis of him being Kurdish. The latter, she submitted would not create any risk to him in the IKR.

The Law

28. The applicable law in this appeal is not controversial and I can set it out briefly.

29. In relation to Art 3, the burden of proof is upon the appellant to establish that there are substantial grounds to believe that there is a real risk to him of being subjected to torture or to inhuman or degrading treatment or punishment, i.e. serious harm.

30. In relation to Art 15(b) of the Qualification Directive (Council Directive 2004/83/EC) the burden of proof is upon the appellant to establish that there are substantial grounds for believing that he would face a real risk of suffering serious harm i.e. torture or inhuman or degrading treatment or punishment in Iraq.

31. In the present appeal, the appellant's claims under Art 3 and Art 15(b) stand and fall together.

32. As regards Art 15(c) the burden of proof is upon the appellant to establishing that there is a serious and individual threat to his life by reason of indiscriminate violence arising from the internal armed conflict in Iraq.

33. The proper approach to Art 15(c) is helpfully summarised by the UT in SMO 1 at [206] as follows:

> "206. It is for the appellants to show that there are substantial grounds for believing that there is a real risk of such treatment. No issues arise under Article 15(a) in these cases. Article 15(b) is essentially coterminous with Article 3 ECHR: Elgafaji, at [28]. In relation to Article 15(c), the leading European authorities remain Elgafaji and Diakite v Commissaire général aux réfugiés et aux apatrides (C-285/12); [2014] 1 WLR 2477 and the leading domestic authority remains QD (Iraq). Whilst the CJEU has more recently had occasion to consider the procedural protections inherent in Article 15 (in M v Minister for Justice and Equality (C-560/14); [2017] 3 CMLR 2), the substantive law remains as it was at the time of MOJ (Somalia) CG [2014] UKUT 442 (IAC). At [31]-

[33] of that decision, the Upper Tribunal extracted the following principles from the leading authorities:

[31] In Elgafaji, the ECJ construed Article15(c) as dealing with a more general risk of harm than that covered by 15(a) and (b). The essence of the Court's ruling in Elgafaji was:

> (43) Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) of the Directive, must be interpreted as meaning that: the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances; the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat."

[32] In Diakite, the Court, having provided a definition of internal armed conflict at [28], reaffirmed in [30] its view that for civilians as such to qualify for protection under Article 15(c) they would need to demonstrate that indiscriminate violence was at a high level:

> (30) Furthermore, it should be borne in mind that the existence of an internal armed conflict can be a cause for granting subsidiary protection only where confrontations between a State's armed forces and one or more armed groups or between two or more armed groups are exceptionally considered to create a serious and individual threat to the life or person of an applicant for subsidiary protection for the purposes of Article 15(c) of Directive 2004/83 because the degree of indiscriminate violence which characterises those confrontations reaches such a high level that substantial grounds are shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region, would – solely on account of his presence in the territory of that country or region – face a real risk of being subject to that threat (see, to that effect, Elgafaji, paragraph 43)."

At [31] the Court reaffirmed the view it expressed in Elgafaji at [39] that Article 15(c) also contains (what UNHCR has termed) a "sliding scale" such that "the more the applicant is

able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection." The Court thereby recognised that a person may still be accorded protection even when the general level of violence is not very high if they are able to show that there are specific reasons, over and above them being mere civilians, for being affected by the indiscriminate violence. In this way the Article 15(c) inquiry is two-pronged: (a) it asks whether the level of violence is so high that there is a general risk to all civilians; (b) it asks that even if there is not such a general risk, there is a specific risk based on the "sliding-scale" notion.

[33] In the United Kingdom, the principal decision of the higher courts dealing with Article 15(c) remains QD (Iraq) v Secretary of State for the Home Department [2011] 1 WLR 689. QD helpfully explains and indicates how Elgafaji should be applied. In addition we have the guidance set out in HM and others (Article 15(c) Iraq CG [2012] UKUT 409 (IAC). At [42]-[45] of HM (Iraq) the Tribunal stated that:

(42) We recognise that the threat to life or person of an individual need not come directly from armed conflict. It will suffice that the result of such conflict is a breakdown of law and order which has the effect of creating the necessary risk. It is obvious that the risk is most likely to result from indiscriminate bombings or shootings. These can properly be regarded as indiscriminate in the sense that, albeit they may have specific or general targets, they inevitably expose the ordinary civilian who happens to be at the scene to what has been described in argument as collateral damage. By specific targets, we refer to individuals or gatherings of individuals such as army or police officers. The means adopted may be bombs, which can affect others besides the target, or shootings, which produce a lesser but nonetheless real risk of collateral damage. By general targets we refer to more indiscriminate attacks on, for example, Sunnis or Shi'as or vice versa. Such attacks can involve explosions of bombs in crowded places such as markets or where religious processions or gatherings are taking place.

(43) The CJEU requires us to decide whether the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level as to show the existence for an ordinary civilian of a real risk of serious harm in the country or in a particular region. When we refer below to the "Article 15(c) threshold", this is what we have in mind. Thus it is necessary to assess whether the level of violence is such as to meet the test. (…)

(44) In HM1 at [73] the Tribunal decided that an attempt to distinguish between a real risk of targeted and

incidental killing of civilians during armed conflict was not a helpful exercise. We agree, but in assessing whether the risk reaches the level required by the CJEU, focus on the evidence about the numbers of civilians killed or wounded is obviously of prime importance. Thus we have been told that each death can be multiplied up to seven times when considering injuries to bystanders. This is somewhat speculative and it must be obvious that the risk of what has been called collateral damage will differ depending on the nature of the killing. A bomb is likely to cause far greater "collateral damage" than an assassination by shooting. But the incidence and numbers of death are a helpful starting point.

(45) The harm in question must be serious enough to merit medical treatment. It is not limited to physical harm and can include serious mental harm such as, for example, post-traumatic stress disorder. We repeat and adopt what the Tribunal said in HM1 at [80]:

In our judgment the nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life or person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants as well as result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive. Such violence is indiscriminate in effect even if not necessarily in aim. As the French Conseil d'Etat observed in Baskarathas, it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question: it can simply be a product of the breakdown of law and order.""

34. In this appeal the appellant relies on the 'sliding scale' approach adopted in SMO 1 following the CJEU's decisions in Elgafaji, especially at [39] and Diakite at [31].

35. In SMO 1, the UT provided country guidance on the application of the 'sliding scale' test in Iraq summarised at paras (3) – (5) of the judicial headnote as follows.

"3. The situation in the Formerly Contested Areas (the governorates of Anbar, Diyala, Kirkuk, Ninewah and Salah Al-Din) is complex, encompassing ethnic, political and humanitarian issues which differ by region. Whether the return of an individual to such an area would be contrary to Article 15(c) requires a fact-sensitive, "sliding scale" assessment to which the following matters are relevant.

4. Those with an actual or perceived association with ISIL are likely to be at enhanced risk throughout Iraq. In those areas in which ISIL retains an active presence, those who have a current personal

association with local or national government or the security apparatus are likely to be at enhanced risk.

5. The impact of any of the personal characteristics listed immediately below must be carefully assessed against the situation in the area to which return is contemplated, with particular reference to the extent of ongoing ISIL activity and the behaviour of the security actors in control of that area. Within the framework of such an analysis, the other personal characteristics which are capable of being relevant, individually and cumulatively, to the sliding scale analysis required by Article 15(c) are as follows:

   - Opposition to or criticism of the GOI, the KRG or local security actors;
   - Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;
   - LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;
   - Humanitarian or medical staff and those associated with Western organisations or security forces;
   - Women and children without genuine family support; and
   - Individuals with disabilities."

The Appellant's Evidence

36. The appellant gave oral evidence at the hearing.

(1) In Chief

37. In his evidence-in-chief, he adopted his witness statement dated 14 June 2022. In that witness statement, he says that he would be at risk travelling through checkpoints between Baghdad and Mosul without a CSID or INID. He says he does not know where his CSID document is, "I left the document when I fled". He says that he has never been to school and illiterate and has never been able to read his ID documents. He says that: "These documents were held by my mother in the house and were not often used as I did not travel."

38. The appellant says that he would be at risk in Mosul even though ISIS are no longer in charge because he is Kurdish, and a Sunni Muslim who would be in a minority. The Shia Militia are still in control and they do not like Sunni Muslims or Kurds. He says that he fears the Shia Militia would question him about his return and assume that he is wealthy as he comes from abroad and that he would be at risk of kidnap or attack and will be perceived to be westernised as he has spent much time out of the country. He says that he has been speaking English fluently and this has changed the way that he speaks Kurdish to his friends and this would be noticed if he were approached by the Shia Militia.

39. The appellant says that he was born a Sunni Muslim but he is a Muslim "by name only" as once he left Iraq and the pressure to comply with practising the religion stopped, he no longer practised his religion. He says he has no intention of ever practising his religion again and does not want to attend mosque or to pray. He says that he has a large tattoo on his left arm, which he did six years ago, that tattoo states his name and that he has been insulted and criticised many times in the UK by Kurdish Iraqis who are not happy that he has done this as it goes against Islam and they also criticise the way he dresses such as, he says, "when I wear ripped jeans".

40. The appellant says that he last saw his family in Iraq in the summer of 2014 at the start of the war when ISIS invaded. He says that either his family would have fled to safety or they could have been killed by ISIS. He says that he would like to find his family but he believe in his heart that they were killed.

41. The appellant says that when he lived in Mosul the only person in his family who had a mobile phone was his father and he (the appellant) did not have his own phone. He says that he kept a piece of paper in his pocket with his father's number in case of emergencies and when he fled he still had that number in his pocket but he lost it on his journey to the UK. He says that he has not had any contact with anyone in his family since he left Iraq.

42. As regards the IKR, the appellant says that he has never worked in his life, he had no skills, no qualifications or experience and, together with his medical condition, work would be impossible. He has no family in the IKR and he would not be able to find accommodation there and be able to live.

43. As regards his health, the appellant said that he may need another operation in the future and he hopes that this operation would help with the ongoing pain and discomfort and help him to gain normal function.

44. I interpolate that this refers to a genital problem from which the appellant has suffered since birth and which, he claimed, but Judge Lever rejected, gave rise to sexual assaults in Iraq and a perception that he was gay.

(2) Cross-Examination

45. In cross-examination, the appellant said that he had no contact with his family since he left Iraq in 2014. He was asked about evidence, in the form of emails with the Red Cross produced at the hearing, concerning attempts to trace his family. He said that he had done this because he had been told he needed some evidence that he had no contact with his family so he went to seek help from the Red Cross. He said he believed that all his family had died.

46. The appellant said that he had not tried to contact his family through Facebook, his father was a very old man (in his 50s) and was not capable of using a smartphone with Facebook. He said he had not tried to contact any friends because he did not have many friends as he was a sick person

and always at home and did not have much contact with people in Iraq. He said that if he was in fact in contact with his family he would happily share that. When asked whether he knew it would help his case in the UK if he said he had no contact with his family, he said "of course" if he had no family to return to "then of course I'm better off". The appellant said that he had no contact with his family. If he had contact with them, he said that he would share that. He was 100% positive that he had no contact with them since he left in 2014.

47. The appellant was asked about his witness statement at para [3] where he said he had left his CSID in his family home. He agreed that was the case.

48. The appellant was asked about the tattoo which he referred to in para [6] of his witness statement and that he had not mentioned it previously in his appeal. He said the tattoo was on his arm and in his religion it would not be accepted. He was asked again why he had not mentioned it in the last appeal, and he said that he might have said it on an occasion but the interpreter may not have got everything and it might have been lost in translation. He was asked why he could not cover it with his clothes and he said that it would eventually be displayed to somebody and it was unwanted in his culture.

49. He was referred to his witness statement where he said he was not practising Islam. He said he stopped practising Islam when ISIS took over his area and were killing innocent people. He says he stopped praying and stopped going to the mosque and any Islamic worship. He was asked why he had not mentioned that at his last appeal, he said he did say it in his statement at the start, that following the appearance of ISIS he stopped praying and practising.

50. He was asked about para [14] of his witness statement where he said that he might need another operation and whether there was any medical evidence to support this. He said that he had had two operations or procedures and currently he was very well and that currently he did not need any further operation. He was asked whether his health prevented him doing any physical work and whether there was any medical evidence to support this and he said yes it did, he could not carry heavy weights. He said that he could not do heavy work because he had an operation and also he would have to sit down and take a rest if he did something physically heavy.

(3) Re-Examination

51. In re-examination, the appellant was asked whether he thought that his family would want him to return to Iraq if he had contact with him and the appellant replied "no".

Discussion and Findings

52. I will deal with the issues relevant to the appellant's international protection claim, as identified by the parties, as follows:

    (1) the risk to the appellant without an ID document;

(2) the risk to the appellant

(a) travelling to Mosul from Baghdad, and

(b) in Mosul;

(3) the option of internal relocation to the IKR.

(1) Risk Without an ID Document

53. It was accepted before me, on the basis of SMO 1 and SMO 2 that if the appellant were to return to Iraq and had to travel from Baghdad Airport (to which Ms Rushforth accepted he would be returned) to Mosul, without an ID document such as a CSID or INID he would be at risk of serious ill-treatment at checkpoints (manned by Shia militia or Iraqi forces) contrary to Art 3 of the ECHR (and Art 15(b) of the Qualification Directive) whilst he was detained in order that his identity could be established. At para (11) of the judicial headnote in SMO 1 it is stated that:

> "As a general matter, it is necessary for an individual to have one of these two documents (i.e. a CSID or INID) in order to live and travel within Iraq without encountering treatment or conditions which are contrary to Article 3 ECHR. Many of the checkpoints in the country are manned by Shia militia who are not controlled by the GOI and are unlikely to permit an individual without a CSID or an INID to pass."

54. As I have already indicated, Ms Rushforth conceded that the appellant could not obtain a replacement CSID or INID whilst in the UK because his CSA office had converted to only issue the new INID cards. She submitted, however, on the basis of the evidence the appellant had left his CSID in Iraq with his family, he was in contact with his family and they could send his CSID to him in the UK such that he would return with it and so the risk identified in SMO 1 would not arise.

55. Mr Coyte submitted that this was not established. He accepted that Judge Lever had found that the appellant had not lost contact with his family. However, he submitted that present evidence was that he could not contact his family and he relied upon the evidence from the Red Cross in emails dated 21 January 2022 and 25 February 2022. Mr Coyte, however, quite frankly accepted, in his submissions when I raised the point with him, that there was no evidence that the appellant had lost contact with his family *since* Judge Lever's decision. In addition, Mr Coyte submitted that, in any event, Judge Lever had not made a positive finding that the appellant could obtain his CSID from Iraq; rather he had found that the appellant could obtain a replacement. Mr Coyte submitted that even if the appellant had left his CSID with his family, the evidence was not such as to establish that he could obtain it from them. He relied upon the situation in Mosul and that the document may have been destroyed. Further, he submitted there was no evidence that the appellant's family could post the document to him. In particular, he relied upon the *CPIN* (July 2022) which made no reference to an individual obtaining his CSID from Iraq by post but rather, at para 2.6.5, contemplated family members being able to meet an individual on arrival in Iraq with the document. Mr Coyte pointed out that Ms Rushforth did not rely on that possibility and the issue of a

document being posted to the UK was not raised in the Home Office's own policy document. Fnally, Mr Coyte submitted that the evidence was that his father would have no incentive to send the CSID in order to comply with the Home Office's removal of the appellant. Mr Coyte relied on the fact that the appellant's father had paid for him to come to the UK and he made reference to what was said in the case of EU (Afghanistan) v SSHD [2013] EWCA Civ 32 at [10] (and not page 1625 as cited in the skeleton argument) that families were "unlikely to be happy to cooperate with an agent of the Secretary of State for the return of their child".

56. I begin with Judge Lever's adverse credibility finding. That is relevant in determining whether I accept the appellant's claim that he has lost contact with his family in Iraq and he could not obtain his CSID from them. He accepted, of course, in his oral evidence that he had left his CSID with his family when he came to the UK in 2014.

57. Judge Lever made a comprehensive adverse credibility finding rejecting each part of the appellant's evidence on the central matters he relied upon in his claim. In particular, the judge did not accept the appellant's claim that he was gay, that his father had been a member of the Ba'ath Party and that as a consequence of his background the appellant had been subject to the claimed sexual assaults and adverse interest from ISIS. To the extent any of those findings were challenged in the appeal to the Upper Tribunal, I rejected the argument that they were not legally sustainable (see [36] to [40] of my decision). I further upheld as legally sustainable Judge Lever's finding, which is preserved, that the appellant had not lost contact with his family (see [23] of my decision).

58. In assessing the appellant's evidence now, and in reaching findings on these issues, I bear in mind what was said by the Senior President of Tribunals (Sir Ernest Ryder) in Uddin v SSHD [2020] EWCA Civ 338, in relation to the approach to assessing the truthfulness of an individual on one matter when they have been disbelieved on another. At [11], he referred to the well-known 'Lucas direction' used in the Crown Court when directing juries as follows:

> "10. I note in that regard the conventional warning which judges give themselves that a person may be untruthful about one matter (in this case his history) without necessarily being untruthful about another (in this case the existence of family life with the foster mother's family), known as a 'Lucas direction' (derived in part from the judgment of the CACD in *R v Lucas* [1981] QB 720 per Lord Lane CJ at 723C). The classic formulation of the principle is said to be this: if a court concludes that a witness has lied about one matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. That is because a person's motives may be different as respects different questions. The warning is not to be found in the judgments before this court. This is perhaps a useful opportunity to emphasise that the utility of the self-direction is of general application and not limited to family and criminal cases."

59. In other words, simply because an appellant has been found to be untruthful about one aspect of his case, does not necessarily mean that he is being untruthful in relation to other aspects of his case, although lying in relation to significant matters may be highly relevant in assessing whether the appellant is to be believed in relation to other significant matters. This point was made in the Supreme Court decision in MA (Somalia) v SSHD [2010] UKSC 49 in the judgment of the Court given by Sir John Dyson SJC at [32] – [33]:

> "32. Where the appellant has given a totally incredible account of the relevant facts, the tribunal must decide what weight to give to the lie, as well as to all the other evidence in the case, including the general evidence. Suppose, for example, that at the interview stage the appellant made an admission which, if true, would destroy his claim; and at the hearing before the AIT he withdraws the admission, saying that his answer at interview was wrongly recorded or that he misunderstood what he was being asked. If the AIT concludes that his evidence at the hearing on this point is dishonest, it is likely that his lies will assume great importance. They will almost certainly lead the tribunal to find that his original answers were true and dismiss his appeal. In other cases, the significance of an appellant's dishonest testimony may be less clear-cut. The AIT in the present case was rightly alive to the danger of falling into the trap of dismissing an appeal merely because the appellant had told lies. …"

60. Then, having cited R v Lucas, Sir John Dyson SJC continued:

> 33. … So the significance of lies will vary from case to case. In some cases, the AIT may conclude that a lie is of no great consequence. In other cases, where the appellant tells lies on a central issue in the case, the AIT may conclude that they are of great significance. MA's appeal was such a case. The central issue was whether MA had close connections with powerful actors in Mogadishu. The AIT found that he had not told the truth about his links with Mogadishu. It is in such a case that the general evidence about the country may become particularly important. It will be a matter for the AIT to decide whether the general evidence is sufficiently strong to counteract what we have called the negative pull of the appellant's lies."

61. In this case, the appellant maintains, in his oral evidence, that he lost contact with his family when he left Iraq in 2014. That is contrary to Judge Lever's preserved finding. As Mr Coyte accepted, there is no specific evidence that the appellant has lost contact *since* that date. He relies upon the emails from the Red Cross dated 21 January 2022 and 25 February 2022. The appellant said in his oral evidence that these approaches were made because he had been told that it would be helpful to his case concerning whether he had lost contact with his family. No approaches had previously been made prior to the FTT hearing. The problem for the appellant with these emails is that they do not provide any positive support that contact cannot be made with the appellant's family. In the more recent email, the writer who describes herself as the "Restoring Family Links Coordinator" states that because of the circumstances in Iraq

> "for the safety of our service users' data and information held about them, we cannot do any work on any current International Family Tracing Cases, nor can we respond to any new referrals."

62. The consequence is that, at its highest, these emails show that the appellant has contacted the Red Cross but it provides no evidence whatsoever that his family cannot be contacted since the Red Cross is not effecting family tracing cases at the moment.

63. That evidence does not, in my judgment, take the appellant's case that he has lost contact with his family (whether in 2014 or since Judge Lever's decision in 2019) any further. The appellant has not previously been believed in respect of any of the central parts of his account upon which he relies. I see no basis, on the evidence, to do other than accept, as I do for myself, that the appellant is not to be believed that he has lost contact with his family.

64. In his evidence, the appellant sought to maintain an account that has been disbelieved. Nothing that I heard from the appellant in his oral evidence persuades me that I should not apply (and adopt) Judge Lever's (now) unassailable comprehensive adverse credibility finding to the appellant's current evidence.

65. That then leaves Mr Coyte's remaining points that the CSID may have been destroyed or, even if it has not, there is no evidence to support the ability of the appellant's family to post that to the appellant in the UK.

66. Mr Coyte did not take me to any specific material to support his contention that, since 2019, the situation in Mosul is such that I should not accept that the CSID, which the appellant says he left with his family, remains with his family in Mosul. I bear in mind the evidence in SMO 1 concerning Ninewa Governorate (and Mosul in particular) at [51]-[76] and the UT's view expressed at [258]-[261], especially at [258} where it is said:

> "258. Approximately a third of Ninewa is disputed between the GOI and the IKR, including Sinjar in the north and the part which lies to the east of the Tigris river in the east. It is the most ethnically diverse governorate in Iraq. Iraq's second city, Mosul, is in Ninewa. It was adopted as ISIL's capital from 2014 to the liberation of the city in July 2017. The battle for Mosul cost many lives. It also resulted in Western Mosul being razed to the ground by heavy artillery fire. What remains of that part of the city is riddled with corpses, unexploded ordinance and booby traps, although reconstruction and rehabilitation efforts on the part of the Iraqi authorities and the international community are underway. The devastation in Eastern Mosul, on the other side of the Tigris, was nowhere near as bad. The majority of the city's population of 1.5 million left and have not returned. Sinjar and Baaj were also largely destroyed and the Yezidi population of Sinjar suffered some of the worst abuses during ISIL's occupation."

67. The point now relied upon was not part of the appellant's case before Judge Lever. Despite the view that large parts of Mosul have been destroyed and there were many civilian casualties, nevertheless the impact differs across Mosul. Large numbers of refugees, who left, have

returned to the Governorate including Mosul (see, e.g. [74]). As I have said, Mr Coyte did not specifically draw this material to my attention. In my judgment, Mr Coyte's contention is speculation and not established on the basis of the evidence.

68. Mr Coyte, in his oral submissions and skeleton argument, raised the issue of whether Judge Lever had made any clear finding in relation to the location of the appellant's CSID. I do not accept that submission as Judge Lever, plainly, in para [33] approached the issue of the appellant obtaining a replacement CSID only "if necessary". The appellant's own evidence, given before me, was that he had left his CSID with his family in Iraq when he came in 2014. He accepted that the existence of his CSID and his ability to obtain it was a matter contrary to his claim that he would be at risk on return. I see no basis upon which I should not accept evidence given by the appellant which is contrary to his own interests. Even if Judge Lever did not make a clear finding, I do on the basis of all the evidence before me. I do not, therefore, accept that it is established that the appellant's CSID, which he left with his family, and with whom he has not lost contact, has been destroyed.

69. Next, Mr Coyte submitted that it was contrary to the Home Office's guidance in the *CPIN* (July 2022) that the appellant would be able to obtain the CSID by it being posted to the UK. The basis of this submission, in my judgment, overstates the significance of para 2.6.5 of the *CPIN* which contemplates family members bringing an individual's CSID with them to, for example, Baghdad. The fact that the *CPIN* makes no reference to a document being posted to the UK does not make a contention based upon that possibility contrary to that guidance. Mr Coyte's submission is, in reality, tantamount to saying that a postal system cannot operate between Iraq and the UK. He offered no evidence to support this claim. The contention flies in the face of the position (previously) recognised in the country guidance decision of SMO 1 that, in certain circumstances, a replacement CSID could be obtained by an individual's family (through a proxy) in Iraq and made available to the individual in the UK. It was not suggested before me that this (previously) accepted position required the family member to bring the document to Baghdad Airport on an individual's arrival in Iraq. I do not accept, in the absence of clear evidence, that there is not a functioning postal system between Iraq and the UK such that the appellant's family could post his CSID to him so that he arrived in Iraq with it in his possession.

70. Finally, Mr Coyte submitted that I should not find that the appellant's father would be prepared to do this. He relied on what was said by Sir Stanley Burnton in the Court of Appeal in EU at [10] as follows:

> "10. … Unaccompanied children who arrive in this country from Afghanistan have done so as a result of someone, presumably their families, paying for their fare and/or for a so-called agent to arrange their journey to this country. The costs incurred by the family will have been considerable, relative to the wealth of the average Afghan family. The motivation for their incurring that cost may be that their child faces risk if he or she remains with them in Afghanistan, or it may

> simply be that they believe that their child will have a better life in this country. Either way, they are unlikely to be happy to cooperate with an agent of the Secretary of State for the return of their child to Afghanistan, which would mean the waste of their investment in his or her journey here."

71. That was, of course, an opinion expressed by Sir Stanley Burnton and not an evidential finding let alone a binding conclusion for future cases. It reflects the need to exercise caution in assuming that an individual will be assisted by his family abroad. There is, in this appeal, evidence that the appellant's father provided funds to allow the appellant to leave Iraq with the aid of an agent. The appellant's evidence was that he took money which his father had saved up to pay for medical treatment for him. Judge Lever noted at para [26] of his decision, that the appellant's father had saved $1,000 with that in mind. Judge Lever, however, did not accept that was the case at para [26]. He did not accept that the appellant's father would have such a sum of money in his house and that the appellant could, on short notice, coincidentally take the money and arrange for an agent to take him from Iraq. This was part of the judge's reasoning that led to his overall adverse credibility finding and his rejection of the appellant's account. The factual premise, therefore, upon which Mr Coyte relies and then prays in aid [10] of EU, was not accepted by Judge Lever. Bearing that in mind, but also bearing in mind the caution expressed by the Court of Appeal in [10] of EU, I remain unpersuaded, even on a lower standard of proof, that the appellant has established that his family (including his father) would not assist him if he requested that they send on to him in the UK his CSID because he cannot remain in the UK.

72. For all these reasons, therefore, I find that the appellant can obtain his CSID from his family in Iraq and that he will return to Iraq in possession of it such that, applying SMO 1 and SMO 2, the appellant has failed to establish that he would be at risk contrary to Art 3 of the ECHR and Art 15(b) the Qualification Directive on the basis of not having a CSID on return.

***(**2) Risk in Iraq*

73. Both in his oral submissions and skeleton argument, Mr Coyte focused upon the risk to the appellant at checkpoints manned by Shia Militia or government forces on his journey between Baghdad (to which he would be returned) and his home area of Mosul. He focused that risk upon the contention that the appellant, applying the 'sliding scale' in SMO 1, would be at risk of serious harm as a result of indiscriminate violence. Mr Coyte relied upon the fact that the appellant is Kurdish, he has a tattoo on his arm, he comes from an area formally held by ISIS and is a young man of fighting age, he has a westernised appearance and, on being questioned at a checkpoint, the appellant could not lie or dissemble and by describing the basis that he claimed asylum in the UK he would be suspected to be an apostate and perceived to be gay. Mr Coyte also submitted that the same risk applied in Mosul, the appellant's home area.

74. There is, in my judgment, a potential confusion here between a claim based upon Art 3 of the ECHR and Art 15(b) of the Qualification Directive, on the one hand and Art 15(c) on the other hand. The focus of Art 15(c) is a risk from "indiscriminate violence", in other words when an individual is caught up in an internal armed conflict. It is not primarily concerned with targeted violence against an individual. That is primarily the focus of Art 3 and Art 15(b).

75. The appellant's original claim was that in Mosul he would be at risk of serious harm as a result of "indiscriminate violence" because of the conflict between ISIS and Peshmerga forces. The sliding scale takes into account factors, as set out in SMO 1 at paras (4) – (5) of the headnote set out above. Here, however, as the appellant's reliance upon HJ (Iran) illustrates, much of his claim is that he personally will be *targeted* as a result of questioning at checkpoints en route to Mosul. It is not clear to me, therefore, that the appellant's claim at least in relation to any serious harm he might be exposed to en route to Mosul, should be properly analysed under Art 15(c) rather than Art 15(b) of the Qualification Directive. However, neither representative sought to rely other than upon Art 15(c) as being the focus of the appellant's claim. With the caveat that I have entered above, I am content to determine the appeal on that basis. No doubt, any risk arising, for example, not from "indiscriminate" violence emanating from the Shia Militia but rather as a result of targeted violence or mistreatment due to the appellant's appearance or anything he said in response to questioning at checkpoints can be factored in to assessing his claim under Art 15(c) and, given that no point was taken by either representative in this regard, if the appellant is entitled to succeed under Art 15, it is not significant in this appeal, whether the success in that claim is couched in terms of Art 15(b) or Art 15(c).

76. The first point is that, as I have found above, the appellant will return to Iraq with his CSID.

77. Mr Coyte submitted that the appellant would be screened at checkpoints between Baghdad and Mosul, which would result in him being questioned and therefore, brought to the attention of the Shia Militia manning those checkpoints and questioning, which would result in him being required to disclose his background, which would put him at risk.

78. Mr Coyte relied upon the *CPIN* "Iraq: security and humanitarian situation" (May 2020) at paras 9.1 – 9.2 and a news report in the Daily Ekurd, "Iraq: A State of Surveillance – Databases, Tracking And Corruption" (at page 628 of the bundle) and the more recent *CPIN*, "Iraq: internal relocation, civil documentation and returns" (July 2022) at para 7.1.1 – 7.1.2, to seek to establish the existence of checkpoints, heightened security and a screening process which the appellant would face.

79. I note that the June 2020 *CPIN* has been replaced by the July 2022 *CPIN*. The latter at paras 7.1.1 – 7.1.2 refers to background material published by Freedom House (28 February 2022) and the US Department of State's Annual Report on "Human Rights Practices in Iraq" (12 April 2021) with

freedom of movement. At 7.1.1, the background material notes that: "Freedom of movement has improved somewhat as areas formerly controlled by IS [Islamic State] were brought under government control".

80. At para 7.1.2, the US Department of State Report states as follows:

> "The constitution and law provide for the freedom of internal movement, foreign travel, emigration, and repatriation, but the government did not consistently respect these rights …
>
> In some circumstances authorities restricted movements of displaced persons, and authorities did not allow some IDP camp residents to depart without specific permission, thereby limiting access to livelihoods, education, and services. Many parts of the country liberated from ISIS control suffered from movement restrictions due to checkpoints of PMF [Popular Mobilisation Forces] units and other government forces …
>
> The law permits security forces to restrict in-country movement and take other necessary security and military measures in response to security threats and attacks. There were numerous reports that government forces, included the ISF [Iraqi Security Forces], Peshmerga, and the PMF, selectively enforced regulations, including for ethno-sectarian reasons, as well as criminal extortion, requiring residency permits to limit entry of persons into areas under their control.
>
> Multiple international NGOs [Non-Governmental Organisation] reported that PMF Units and the Peshmerga prevented citizens, including Sunni Arabs and members of the ethnic and religious minority groups, from returning to their homes after government forces ousted ISIS. UNHCR reported that local armed groups barred returns to certain areas of Baiji, Salah al-Din Province. Similarly, Christian CSOs [Civil Society Organisations] reported that certain PMF groups, including the 30th and 50th PMF Brigades, prevented Christian IDP returns and harassed Christian returnees in several towns in the Ninewa Plain, including Bartalla and Qaraqosh. Members of the 30th Brigade also refused to implement a decision from the prime minister to remove checkpoints, and their continued obstruction led to forced democratic change in traditionally Christian areas of the Ninewa Plain."

81. I was referred to the decision in SMO 1, although not specifically on this issue, but I note that it recognises the existence of "checkpoints" in Iraq (see [43]) and reference is also made to the "use of fake checkpoints for ambushing and kidnapping". Further, in the earlier country guidance decision of AAH (Iraqi Kurds – international relocation) Iraq CG [2018] UKUT 212 (IAC) at [111] the UT noted the existence of "innumerable checkpoints" on the roads between Baghdad and the IKR. Of course, the central issue in a number of country guidance cases, for example AAH and SMO 1, concerned the risk to an individual travelling from their point of entry to Iraq to their home area in the absence of a CSID or INID and was predicted on the risk arising at "checkpoints".

82. On this basis, I accept that the appellant would encounter a number of checkpoints between Baghdad and his home area of Mosul manned by Shia Militia and/or Government Security Forces.

83. What is less clear is what would occur to the appellant at such a checkpoint. Mr Coyte's case on behalf of the appellant is that he would be questioned in a way that would require him to disclose his background which would put him at risk.

84. The country guidance case law is only concerned with the impact on an individual at a checkpoint who lacks a CSID or INID to establish his identity. It is the absence of such a document which that case law recognises puts an individual at risk of detention and serious harm contrary to Art 3 of the ECHR (and Art 15(b) of the Qualification Directive) whilst checks are made about his or her identity.

85. At [347] of SMO 1, the UT summarised Dr Fatah's evidence in AAH as follows:

> "It was Dr Fatah's uncontested evidence [AAH] that a failure to produce a CSID or, in the environs of the airport, a valid passport, would be likely to result in detention until the authorities could be satisfied of an individual's identity."

86. At [378] of SMO 1, the UT emphasised the importance of an identity document in order to prove an individual's identity at a checkpoint:

> "In light of the other evidence which we have about the behaviour of the PMU, we accept what was said by Dr Fatah about their likely attitude to alternative forms of identity. He reminded us that they are often religious zealots with the most rudimentary training. If, as is very likely to be the case, they have been trained to ask people for a CSID or an INID, there is every reason for them to insist upon seeing such a document. All of the evidence shows that those who do not have one of these recognised forms of identification are likely to encounter difficulties at checkpoints."

87. Indeed, the UT went on to conclude that in the absence of such a document it was likely that an individual would be at risk of ill-treatment contrary to Art 3 of the ECHR or Art 15(b) of the Qualification Directive (see para (11) of the judicial headnote).

88. In SMO 1, the evidence concerning questioning at checkpoints was set out by the UT at [156] given by Dr Fatah as follows:

> "156. Dr Fatah was asked about the parts of his report in which he had identified personal characteristics giving rise to increased risk. He explained that a Sunni Kurd would face as much additional risk as a Sunni Arab. After 2017, a Kurd might face more questioning in Iraq proper and particularly at checkpoints which were manned by Iraqi forces, who would want to establish whether he had any political affiliations or ties to the Peshmerga. Dr Fatah did not consider there to be any additional risk from having been out of Iraq, unless an individual did not have an ID or was displaying non-Islamic symbols at a checkpoint, for example. An association with the Iraqi Security Forces was definitely a profile which enhanced an individual's risk, however."

89. On its face, that evidence raises the possibility that a Kurd (such at the appellant) would face "more questioning" in Iraq "particularly at checkpoints which were manned by Iraqi forces". That questioning is, according to Dr Fatah, directed towards establishing "whether [the individual] had any political affiliations or ties to the Peshmerga". The latter, of course, does not apply to the appellant although, if taken at face value, Dr Fatah's evidence would support, at least, that questioning of the appellant was more likely because he is Kurdish. Whilst Dr Fatah's evidence does refer to the potential of "more questioning at checkpoints recurred", it is not clear to me that Dr Fatah is expressing that view in the context of an individual who has a CSID and may, if a Kurd, be subject to questioning about any political affiliations or rather he is referring to a situation where an individual has not been able to produce a CSID or INID and, is therefore, likely to be questioned in order to establish their identity. Unfortunately, neither representative drew my attention to this evidence and consequently I heard no submissions on it. If anything, the overall context of the evidence and case law suggests the latter was Dr Fatah's focus rather than the former where an individual's identity is established simply by producing a CSID or INID.

90. However, given that I heard no submissions on this, I am prepared to give the appellant the benefit of the doubt in interpreting Dr Fatah's evidence and, in this appeal, I proceed on the basis that the appellant may be questioned at a checkpoint even though he is in possession of his CSID. That, however, does not mean that I accept Mr Coyte's submission that he would be at real risk of serious harm as a result. That submission is based upon a number of features of the appellant which it is said give rise to a real risk to him.

91. First, I accept on the basis of the background evidence, to which Mr Coyte referred me in his skeleton argument, in particular at paras [27] and [28] that the relevant *CPINs* identity a heightened risk of ill-treatment on the basis if a person is perceived to be an apostate, as being gay or is visibly westernised (see, *CPIN*, "Iraq: Religious Minorities") (July 2021) (paras 6.1.2 and 7.1.1 – 7.1.2) and *CPIN*, "Iraq: Sexual Orientation Expression" (September 2021), especially at paras 2.4.21 and 6.1.1).

92. Secondly, however, Judge Lever found that the appellant is not gay and also, albeit in the context of any risk to him in Mosul, did not accept that he would be perceived as gay as a result of his appearance/demeanour or his genital problem which had required treatment (see paras [19] – [21] of Judge Lever's decision). Judge Lever rejected the appellant's claim to be gay (paras [22] – [23]) and that he had suffered any adverse attention because of his alleged father's association with the Ba'ath Party (see para [24]).

93. Thirdly, as regards the appellant's claim now, the appellant did not previously rely upon the impact of his tattoo (containing his name "Ali R") or that he would be perceived as someone who was westernised and had no religion. None of those claims were made before Judge Lever. The appellant's evidence is not that he has converted from Islam to

Christianity or even ceased to be a Muslim but rather that he has not attended the mosque or prayed since ISIS attacked Mosul. Even if the Iraqi authorities were aware of the appellant's background (to which I shall return shortly) I am not satisfied that he would be suspected, as Mr Coyte submitted, to be an apostate (which he is not) and, as a consequence, be at risk.

94. I do not accept that the appellant has established that his demeanour would lead to an implication (falsely given Judge Lever's findings) that the appellant is gay. Judge Lever did not accept that that was the implication of the appellant's appearance and the appellant was asked no questions about that either in chief or cross-examination in his oral evidence before me.

95. Judge Lever also did not accept that the appellant's intimate medical issues would raise any perception that would give rise to a risk to him. He rejected the appellant's account that included assaults, in part arising from this. The appellant's oral evidence before me was that he had undergone corrective operations and no further operations were anticipated. I agree with Judge Lever and I do not accept that this would create any real risk to the appellant on return based upon a perception (perhaps) of being gay or on some other discriminatory basis.

96. The claim based upon his appearance (including the tattoo) is intimately connected to the appellant's contention, supported in Mr Coyte's submissions by reference to the UTs decision in YMKA and others ("westernisation") Iraq [2022] UKUT 16 (IAC) that the appellant is at risk because of his westernised demeanour and appearance which will give rise to a risk of imputed political opinion or religion.

97. Mr Coyte did not draw to my attention any evidence which leads me to conclude that the fact that the appellant has a tattoo on his left arm which gives his name and, as Mr Coyte submitted, the name of the first Caliph in Shia Islam, would (given that it is the appellant's own name) if seen at a checkpoint, give rise to potential ill-treatment based upon a negative view of the appellant's religious beliefs or political opinion. Likewise, the mere fact that the appellant in the UK is said to, for example, wear "skinny jeans" and to appear "effeminate" cannot in my judgment establish a real risk on return in the way that Mr Coyte contends. As I have already said, Judge Lever did not accept that the appellant's demeanour gave rise to any implication that the appellant is gay. There is no further evidence before me which leads me to reach any other conclusion on the evidence myself.

98. I reach the same conclusion in relation to the appellant's claimed risk based upon appearing "westernised". In my judgment, the decision in YMKA and others cannot assist the appellant. In the headnote, the UT recognised the scope of protection given to an individual who claimed that he or she was at risk because they would be considered "westernised":

“The Refugee Convention does not offer protection from social conservatism per se. There is no protected right to enjoy a socially liberal lifestyle.

The Convention may however be engaged where

(a) a 'westernised' lifestyle reflects a protected characteristic such as political opinion or religious belief; or

(b) where there is a real risk that the individual concerned would be unable to mask his westernisation, and where actors of persecution would therefore impute such protected characteristics to him.”

99. At [30]-[32] UTJ Bruce set out the position as follows:

“30. It cannot be said that the contracting states agreed to offer a protected and unfettered right to enjoy ones life in the way that one would like: there is no human right to listen to a particular kind of music, drink alcohol or to wear jeans. A claim based simply on such matters could not, under the Convention, succeed. But is there not more at stake here?

31. Integral to the Appellants' claim to be 'westernised' - and their collective decision to live their lives in the way that they do - are their values. All the adults speak of their abhorrence of extremism, and their support for a secular, democratic, society; the family evidences a strong belief in gender equality. Whilst A4's decision to date her boyfriend, or to wear what she likes, are at first glance wholly personal matters, they are here expressions of a deeply held ideological belief. Such political opinion is, uncontroversially, a characteristic capable of attracting protection under the international framework. No dispute arises that there is a protected right not to believe in a god: see Article 10(1)(b) of the Qualification Directive (2004/83/EC) and Article 18 of the International Covenant on Civil and Political Rights 1966. Similarly, it is well established that in certain circumstances the harms visited upon women can amount to persecution for reasons of their membership of that particular social group. Where, therefore, the Convention does not offer protection from social conservatism generally, it *can* do so in certain circumstances, here where the modifications required of the claimants amount to suppressions of the inalienable rights afforded to them by international law.

32. There is another way in which 'westernisation' could entitle an individual to protection. In his evidence A1 very candidly explained that he might be able to "fake" being Muslim. He has, for instance, seen many Muslims at prayer throughout his life, and so knows the order in which you stand, bow etc. On further probing, however, he admitted that he had no idea what the words are. This highlights a discrete protection issue. Envisage a claim which would *prima facie* fail on the grounds articulated by [Lord Hope] in HJ (Iran) and by Laws LJ in Amare: a man who, for instance, had no particular religious or ideological underpinning to his lifestyle, who simply enjoys the freedom that life in the UK can offer. That man could quite reasonably be *expected*, as a matter of law, to simply conform to the norms and expectations of the society that he is going back to. The Convention is not there to protect him from having to live under a regime where

> pluralist liberal values are less respected than they are here. The question remains whether it is *possible* for him to safely do that. If an individual has for instance been living in the UK for a very long time or is unfamiliar with the prevailing culture in his country of origin, there may always be the risk that his modified behaviour will slip, or he will not know how he is supposed to behave. In a particularly hostile environment, such as those discussed in the country guidance cases I mention above, this could expose him to harm. It would then matter little what he himself believed: the necessary nexus is created by the perspective of the persecutor.
>
> 33. A claim based on 'westernisation' can therefore succeed in one, or both, of these ways. Although evidence about fashion, or entertainment preferences, appears at first glance to consist of little more than an appeal to pluralism, and thus lying entirely outwith the protection framework, that evidence must be carefully assessed. First, to determine whether the lifestyle choices of the claimant are in fact an ex pression of beliefs prohibited or disapproved of in his country of origin. Second, whether there is a real risk of that claimant failing to effectively mask his 'western' identity and thus exposing himself to harm."

100. The crucial point is that the appellant does not enjoy a right to a "socially liberal lifestyle" to the extent that can be said to encompass his westernised demeanour, such as "wearing skinny jeans". As I have already noted, and as Ms Rushforth submitted, the appellant did not rely on this issue before Judge Lever. It does not seem to have been considered a significant basis for any claim. In his oral evidence before me, the appellant gave no indication that his "westernised" lifestyle or appearance was other than a lifestyle based upon choice rather than any principle reflecting a protected characteristic such as political opinion or religious belief.

101. The import of that view, taken from YMKA and others, is that the appellant cannot pray in aid the approach of the Supreme Court in HJ (Iran). That decision is often mis-cited as entitling an individual always to tell the truth and not dissemble such that, in telling the truth or choosing to be discrete to avoid serious harm, the individual has a claim to international protection, in particular under the Refugee Convention. But that is not the scope of the decision in HJ (Iran). What the Supreme Court decided was that an individual could not be required to be discrete or dissemble if their reason for doing so would be to avoid persecution on the basis of one of the protected characteristics under the Convention, namely race, religion, nationality, membership of a particular social group or political opinion. Hence, an individual could not be required to lie (not tell the truth) about their sexual orientation (HJ (Iran)) or their political opinion (RT (Zimbabwe) v SSHD [2012] UKSC 38). The appellant's lifestyle choice of being "westernised" does not fall within a protected right as it is not based upon established political opinion or religious values in the case of the appellant.

102. This point has further implications for the appellant's case and Mr Coyte's submission that the appellant would be at risk because if questioned he

would have to tell the truth about his background. His background does not fall within a protected characteristic of the Refugee Convention. The appellant is not gay; he has no political opinion; and he has no expressed religious belief that is contrary to Islam. Accordingly, applying the approach in HJ (Iran), the appellant cannot claim that he cannot be expected to be discrete and must tell the "truth" about his background. The truth about his background is that he came to the UK and falsely claimed asylum. Even that is not a matter which falls within a Convention right such that he is entitled to state it, even if potentially it would put him at risk. However, nothing was drawn to my attention to suggest that a failed asylum seeker as such, would be at risk on return to Iraq. In my judgment, the appellant's risk at a checkpoint cannot be assessed on the basis that he is entitled (and will) disclose the matters he now relies upon (including a falsely based asylum claim).

103. Further, given the comprehensive adverse credibility finding made by Judge Lever, and nothing in the evidence before me suggests the appellant's account should be accepted, I do not find that it is credible that the appellant would put himself 'in harm's way' (if that were to be case) by disclosing matters which he is not required to do applying the HJ (Iran) principle at a checkpoint when questioned.

104. Taking all these mattes into account, I am not satisfied that there is a real risk that the appellant will suffer serious harm returning to Iraq with a CSID at a checkpoint travelling from Baghdad to his home area of Mosul.

105. Mr Coyte accepted that the risk to the appellant in Mosul was to be considered on the same basis. Of course, it is more appropriate to consider the risk also under Art 15(c).

106. As regards the situation in Ninewa Governorate, which includes Mosul, the UT said this in SMO 1 at [258] – [261]:

> "**Ninewa Governorate**
>
> 258. Approximately a third of Ninewa is disputed between the GOI and the IKR, including Sinjar in the north and the part which lies to the east of the Tigris river in the east. It is the most ethnically diverse governorate in Iraq. Iraq's second city, Mosul, is in Ninewa. It was adopted as ISIL's capital from 2014 to the liberation of the city in July 2017. The battle for Mosul cost many lives. It also resulted in Western Mosul being razed to the ground by heavy artillery fire. What remains of that part of the city is riddled with corpses, unexploded ordinance and booby traps, although reconstruction and rehabilitation efforts on the part of the Iraqi authorities and the international community are underway. The devastation in Eastern Mosul, on the other side of the Tigris, was nowhere near as bad. The majority of the city's population of 1.5 million left and have not returned. Sinjar and Baaj were also largely destroyed and the Yezidi population of Sinjar suffered some of the worst abuses during ISIL's occupation.
>
> 259. The threat from ISIL in Ninewa is higher than in Kirkuk. We note and take seriously the view expressed by the US Consulate and

USAID that ISIL is viewed as a threat to the civilian population in Ninewa (and elsewhere). As in Kirkuk, it holds no territory as such but it has an established presence of attack cells, some of which are heavily armed and well organised. Dr Fatah and other commentators agree that there are relatively few incidents involving civilians and that ISIL is more selective in its targets. The focus remains on targeting figures in military or authority positions. There are nevertheless indicators of a higher threat to civilians in this governorate, including the detonation of a truck bomb in a market, the emptying of villages and ISIL attempts to impose taxes on villagers in rural areas. Parts of the population are subjected to physical and psychological pressure from ISIL, particularly at night. We are grateful to Dr Fatah for his update on the recent developments in Makhmour, in which ISIL are said to have become increasingly brazen and have been burning fields and undertaking other activities in this remote region in an attempt to secure territory.

260. As with Kirkuk, the risk to civilians from ISIL in urban areas is different in character and magnitude to that faced by civilians in rural areas, with the latter being more likely to encounter ISIL pressure in one form or another, whereas the threat to civilians in the urban environment is mostly (but not exclusively) of inadvertent injury in a targeted attack. We note that the threat to civilians comes not only from ISIL. As in other parts of the formerly contested areas, the PMU are said to play a role in criminality and extortion alongside their legitimate function. And the insecurity in Ninewa is compounded by the fact that part of it remain Disputed Territory between the GOI and the KRG. We think Dr Fatah is correct to state that a lasting political solution is needed in order to bring stability to Ninewa and to Iraq as a whole.

261. Dr Fatah and other commentators agree, however, that ISIL presence in the governorate is not unchecked. The Iraqi army is present in the governorate in large numbers. As we have recorded, five of the recent security incidents Dr Fatah recorded in his first report were all of ISIL clearance operations carried out by the ISF and its partners. Ninewa Operations Command are aware of ISIL's increased rural activity in the governorate and are taking steps to address it. A large number of IDPs (1.6 million) have returned to the region. Despite the targeted attacks on authority figures, governors and civil servants have begun to work again in the region, which Dr Fatah agreed was a positive sign. The statistics which we have set out above are not indicative of a high level of threat to the civilian population: amongst a population of 3.7 million, IBC recorded 1596 civilian deaths in 2018 (although we consider that number to have been inflated by the discovery of mass graves from the ISIL era in the governorate during the reporting period) and the intensity of violence is at 46.46 civilian deaths per 100,000 of the population. In 2017, the corresponding figures were 9211 civilian deaths and an intensity of 265.15 per 100,000. Considering the evidence as a whole, and adopting the inclusive approach from HM2, we do not consider that there is such a high level of indiscriminate violence there that substantial

> grounds exist for believing that an ordinary civilian would, solely by being present there, face a real risk which threatens his life or person. The risk of actual or indirect violence to civilians in Ninewa is higher than elsewhere but it nevertheless falls short of the Article 15(c) threshold."

107. I bring forward my earlier findings in relation to any risk to the appellant travelling to Mosul.

108. Judge Lever did not accept that the appellant had been subject to any adverse treatment whilst he lived in Mosul. Applying the "sliding scale" in SMO 1 (following Elgafaji), I take into account that the appellant is Kurdish but, I also note, that the province, including Mosul, is "ethnically diverse". I take into account that the appellant does not possess any of the "personal characteristics" of being opposed to the government, he is not gay and, although he says he no longer prays, he has not converted or relinquished (or converted from) the Islamic religion so as to be (or be perceived as) an apostate. Although he left Iraq in 2014, and has no doubt lived in the UK in a more westernised way than might be usual in Iraq, I do not accept that his demeanour and appearance, taking all the factors and circumstances into account, create a real risk to him under Art 15(c). For these reasons, together with the reasons I gave earlier concerning the risk to the appellant at checkpoints, I am not satisfied that the appellant would be at real risk of serious harm falling within Art 15(c) or Art 15(b) in his home area of Mosul.

(3) Internal Relocation

109. As a result of my findings and conclusions under (1) and (2) that the appellant is not at risk in Iraq (in particular in his home area), the issue of internal relocation to the IKR does not arise and it is unnecessary for me to reach any decision on that issue.

Decision

110. I remake the decision dismissing the appellant's appeal under Art 3 of the ECHR and Arts 15(b) and 15(c) of the Qualification Directive.

111. The FtT's decision to dismiss the appellant's appeal on asylum grounds stands.

112. Mr Coyte did not rely upon Art 8 beyond the appellant's claim to international protection. To the extent necessary, I also dismiss the appeal under Art 8 of the ECHR.

Signed

Andrew Grubb

Judge of the Upper Tribunal

10 October 2022

ANNEX

Decision on preliminary issue following hearing on 7 July 2022

DECISION

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. This appeal was listed for hearing on 7 July 2022 in order to re-make the First-tier Tribunal's decision (Judge Lever) which had been set aside by my decision dated 25 June 2019. However, the substantive hearing could not take place as the appropriate interpreter for the appellant had not been booked.

3. At the hearing an initial point arose as to what, if any, preserved findings stood in the light of my error of law decision. In that regard, I heard oral submissions from Mr Coyte who represented the appellant, and Ms Rushforth who represented the respondent. The issue arises in this way.

4. The appellant is a citizen of Iraq. His claim for asylum was refused by the Secretary of State on 4 September 2018. The appellant is Kurdish and from Mosul in Iraq. His asylum claim was that he is at risk on return because he is gay, because of his father's membership of the Ba'ath Party and because he fears ISIS who had overrun his home town in Mosul and he had refused to fight for them.

5. In a decision sent on 6 February 2019, Judge Lever dismissed the appellant's appeal on all grounds. First, he made an adverse credibility finding and rejected the appellant's asylum claim. Secondly, he rejected the appellant's claim based upon Art 15(c) of the Qualification Directive. Although he accepted, on the basis of the (then) country guidance decisions, that there was a real risk of serious harm arising from indiscriminate violence in the appellant's home area of Mosul, the judge found that the appellant could safely and reasonably internally relocate to the IKR. As part of that finding, and separately also in relation to a claim under Art 3, the judge found that the appellant had not (as he claimed) lost contact with his relatives in Mosul and that he would be able to obtain a replacement CSID so as to safely relocate to the IKR and live there.

6. On appeal by the appellant, in my decision dated 25 June 2019 I concluded that the judge had not erred in law in making his adverse findings and in

rejecting the appellant's asylum claim. As a consequence, that aspect of the judge's decision and his findings stood.

7. However, it was accepted before me that the judge had erred in law in concluding that the appellant could internally relocate to the IKR and I found that the judge had erred in law in finding that the appellant could obtain a replacement CSID and that finding could not stand.

8. As a consequence, I indicated that the appeal should be adjourned in order for the decision to be re-made. The re-making of the decision would be limited to Art 15(c), including the issues of internal relocation to the IKR and whether the appellant could obtain a replacement CSID. The decision would be re-made, as I said in para 33 of my decision, "in the light of the judge's unchallenged finding that there is an Art 15(c) risk in Mosul". In addition, the judge's finding that the appellant had not lost contact with his family in Mosul also stood.

The Scope of the Re-making

The Submissions

9. Ms Rushforth indicated that the Secretary of State wished to reopen the issue whether the appellant would face a risk contrary to Art 15(c) in Mosul. She relied upon the subsequent country guidance decisions of SMO & Others (Article 15(c); identity documents) Iraq CG [2019] UKUT 400 (IAC) ("SMO & Others") and SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 110 (IAC) ("SMO & KSP"). These decisions decided in December 2019 and March 2022 respectively replaced the country guidance at the time of Judge Lever's decision (namely AA (Iraq) v SSHD [2017] EWCA Civ 944 (Annex) ("AA(Iraq)"). She submitted that the Art 15(c) risk that was accepted by Judge Lever as existing in Mosul on the basis of AA, no longer applied. She submitted that the risk based upon the appellant coming from a "contested area" no longer applied and the risk now related to an application of the "sliding scale" assessment recognised in SMO & Others. She submitted that Judge Lever's findings were out of date and should not be preserved.

10. In the course of her submissions, Ms Rushforth referred me to a decision of the Upper Tribunal in Adam (Rule 45: authoritative decisions) [2017] UKUT 370 (IAC), in which the UT had held that it was appropriate to "review" under rule 45 a decision of the Upper Tribunal, which had re-made an FtT decision, in the light of a post-decision country guidance case which could have had a material effect on the outcome of the appeal had it been decided at the time of the UT's re-making of the decision. She submitted that if it is appropriate to "review" a decision of the UT after it is made, it is appropriate during the course of the UT's decision making process to look again at otherwise preserved findings in the light of a new CG decision.

11. On behalf of the appellant, Mr Coyte submitted that it was not appropriate to open up the Art 15(c) issue as the finding by Judge Lever was preserved and had not been challenged and set aside as a result of any error of law. He submitted that the case of Adam related to a country guidance decision that had been made five days after the UT's decision and, as he put it in his submissions, the UT surely must have known that the CG case was pending. Here, he submitted, if the Art 15(c) issue was reopened and the "sliding scale" approach in SMO & Others applied, the scope of the re-making hearing would become vast including considering the personal characteristics of the appellant which were not considered by Judge Lever at the time of his decision.

12. Mr Coyte also submitted that it would be unfair to the appellant to allow the Secretary of State to reopen the Art 15(c) finding without allowing the appellant to also reopen adverse findings made against him, in particular that he had not lost contact with his relatives in Mosul.

13. Mr Coyte also submitted that the case law might permit a reopening of a finding against an appellant, such as in Adam, where the subsequent country guidance case was in the appellant's favour such that to not apply the up-to-date country guidance might result in the UK (through the judicial process) being in breach of the Refugee Convention, the Qualification Directive or the ECHR by potentially returning a person to their country of origin where they would be at risk. That would not be the effect of maintaining the preserved finding of Judge Lever.

Discussion

14. The general scope of, and approach to, proceedings in the UT when re-making a decision following a finding of an error of law by the First-tier Tribunal was considered by the UT in AB (preserved FtT findings; *Wisniewski* principles) Iraq [2020] UKUT 268 (IAC) (Lane J, President and UTJ O'Connor)). In that case, the UT referred to two decisions of the Court of Appeal in Sarkar v SSHD [2014] EWCA Civ 195 and TA (Sri Lanka) v SSHD [2018] EWCA Civ 260 as follows (at [37]–[38]):

> "37. In Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195, the Court of Appeal was faced with the submission that, once it had embarked upon the task under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal had, in effect, to start again and should, therefore, make its own findings on all matters that had been before the First-tier Tribunal, whether or not those matters had been infected by legal error. Giving the judgment of the Court, Moore-Bick LJ regarded that submission as going too far:-
>
> > "14. … Of course, the Upper Tribunal may hear the appeal afresh, if it considers that appropriate, and for that purpose may hear such evidence and argument as it considers necessary, but it is not bound to do so and can (and often does) decide the disputed question of law on the basis of the findings of fact made by the First-tier Tribunal."

15. If it finds that the First-tier Tribunal has made a material error of law the Upper Tribunal may (but need not) set aside its decision. If it decides to do so, it has only two options: to remit the case with directions for its reconsideration or to re-make the decision itself. Remission, however, does not necessarily require the First-tier Tribunal to start all over again; the Upper Tribunal has power to give directions which limit the scope of the reconsideration. It would be surprising, therefore, if, when re-making the decision itself, the Upper Tribunal were required in every case to carry out a complete re-hearing of the original appeal. In my view that is not what Parliament intended. In this context re-making the decision, by contrast with remitting the case to the First-tier Tribunal, involves no more than substituting the tribunal's own decision for that of the tribunal below. It is for the Upper Tribunal to decide the nature and scope of the hearing that is required for that purpose. The purpose of section 12(4)(a) is simply to ensure that, when re-making the decision, the Upper Tribunal has at its disposal the full range of powers available to the First-Tier Tribunal. Nor do I think that the appellants obtain any assistance from the decision in *Kizhakudan v Secretary of State for the Home Department* [2012] EWCA Civ 566, to which Mr. Malik drew our attention. That case decided no more than that one error of law on the part of the First-tier Tribunal is sufficient to give the Upper Tribunal jurisdiction to re-make the decision and deal with all live issues. The court in that case held that the Upper Tribunal had a *discretion* to consider an article 8 claim, even though it might not have been properly raised before the First-tier Tribunal. It did not decide, however, that the Upper Tribunal, having refused permission to appeal on a particular ground, is obliged to consider that ground if it decides to re-make the decision."

38. In TA (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 260, the Court of Appeal articulated the circumstances in which the Upper Tribunal, when re-making a decision pursuant to section 12, should do so by reference to findings of fact made by the First-tier Tribunal, notwithstanding that the latter's decision was being disturbed:-

"7. Where the Upper Tribunal finds an error of law then it may (but need not) set aside the decision of the First-tier Tribunal. If it does set aside the decision of the First-tier Tribunal then it must either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision: see s.12 of the Tribunals, Courts and Enforcement Act 2007. When permission to appeal to the Upper Tribunal has been granted, the parties should assume that the Upper Tribunal will, if it identifies an error on a point of law and is satisfied that the original decision should be set aside, proceed to remake the decision. *In that event, the Upper Tribunal will consider whether to remake the decision by reference to the First-tier Tribunal's findings of fact, and it will generally do so*

save and in so far as those findings have been infected by any identified error or errors of law." (Kitchin LJ)"" (emphasis added)

15. Then, at [39] the UT referred to a decision of the Inner House of the Court of Session in MS and YZ v SSHD [2017] SCIH 41 as follows:

> "39. Also of relevance is the judgment of the Inner House of the Court of Session (Lord Glennie) in MS and YZ v Secretary of State for the Home Department [2017] CSIH 41:-
>
> > "42. Mr Webster accepted before us that the UT was only entitled to interfere with findings in fact made by the FTT if those findings were infected by some error of law or where the FTT made an error of law in reaching those findings in fact. He was correct to make this concession. An appeal from the FTT to the UT lies on a point of law: section 11(1) of the 2007 Act. There is no appeal against the FTT's findings in fact. It is important to understand this point. Of course, it may not always be possible to identify where the line is to be drawn between findings of "pure" fact, where the appellate body cannot usually intervene, and findings which are in truth findings of mixed fact and law or are what is sometimes called "evaluative" findings, where the approach to the fact finding task is determined by the legal framework within which factual assessments have to be made. Thus, there will be cases where, before making its findings in fact, the FTT has first to identify the legal test it is seeking to apply. It may, for example, be required to make a finding as to whether certain conduct is reasonable or proportionate, a question which may depend on the context in which or the purposes for which such an assessment is relevant or necessary; and in approaching these questions it may have to identify what, as a matter of law, requires to be taken into account. In such cases an error of law in identifying what factors are or are not relevant may open up the whole of its decision for reconsideration, including what appear to be findings of "pure" fact, though it will not always do so. If the FTT has erred in law by failing to take relevant matters into account in reaching its decision on the facts, or in taking into account irrelevant matters, or has reached a decision which no reasonable tribunal presented with the evidence and correctly applying the law could have arrived at, that too may entitle the UT to interfere. Another situation, perhaps closer to this case, is where the FTT has erred in law, and the UT takes it upon itself to re-make the decision, as it is entitled to do under section 12(2)(b)(ii) of the 2007 Act. It may in so doing "make such findings of fact as it considers appropriate": section 12(4)(b). But while in that situation the UT has the power to make additional supplementary findings, it does not have the power to overturn findings of "pure" fact made by the FTT which are not undermined or otherwise infected by that or any other error of law. Nothing in the cases cited to us, in particular *Kizhakudan* and *EK*,

> suggests otherwise. Our conclusion on this point is, in our opinion, consistent with the remarks of Lord Carnwath in *HMRC* v *Pendragon plc* [2015] 1 WLR 2838 at paragraphs 49-51.""

16. Having set out passages from Lord Carnwath's judgment in Pendragon, at [41]-[42] the UT reached these conclusions:

> "41. What the case law demonstrates is that, whilst it is relatively easy to articulate the principle that the findings of fact made by the First-tier Tribunal should be preserved, so far as those findings have not been "undermined" or "infected" by any "error or errors of law", there is no hard-edged answer to what that means in practice, in any particular case. At one end of the spectrum lies the protection and human rights appeal, where a fact-finding failure by the First-tier Tribunal in respect of risk of serious harm on return to an individual's country of nationality may have nothing to do with the Tribunal's fact-finding in respect of the individual's Article 8 ECHR private and family life in the United Kingdom (or vice versa). By contrast, a legal error in the task of assessing an individual's overall credibility is, in general, likely to infect the conclusions as to credibility reached by the First-tier Tribunal.
>
> 42. The judgment of Lord Carnwath in Pendragon emphasises both the difficulty, in certain circumstances, of drawing a bright line around what a finding of fact actually is; and the position of the Upper Tribunal, as an expert body, in determining the scope of its re-making functions."

17. As is clear from this case law, the general position is that factual findings which are not infected by any error of law are taken as "preserved" when the Upper Tribunal or First-tier Tribunal on remittal, re-makes the decision. There is a principle of finality in fact-finding and facts which there are no reason to revisit because they have been lawfully found by a judge already in the particular appeal, should remain the basis for any re-making of the decision. But, it is also clear, as Kitchin LJ (as he then was) said in TA (Sri Lanka), that is what the UT in re-making the decision "will generally do". It is clear that the UT (or FtT on remittal subject to the UT's directions) has a discretion, in an appropriate case, to allow a party to revisit factual issues that have previously been decided in the appeal. Of course, it will be unusual, perhaps even relatively rare, to do so.

18. In this appeal, the finding of Judge Lever at the date of his decision, based upon the (then) relevant CG decision in AA (Iraq), that the appellant faced a real risk of serious harm contrary to Art 15(c) in his home area does stand as a finding unaffected by any error of law. There is no reason to look behind that finding as to the position in February 2019 when Judge Lever issued his decision. Likewise, at that point in time the judge's finding that the appellant had not lost contact with his family in Mosul also stands as a finding on the evidence before the judge. That both of those findings should be preserved I have no doubt.

19. However, that does not mean that at the time that the decision is re-made by the UT subsequent events (supported by evidence) should prevent the UT from reaching its own factual findings as to the position *at the date of its decision*. In particular, findings as to whether *now* there is an Art 15(c) risk to the appellant in Mosul and whether *now* (because of any events subsequent to Judge Lever's decision) the appellant has lost contact with his family which he had not done so in February 2019. That is not to revisit preserved findings as such because they remain the findings at the time. They are not being undermined but stand. Instead, the UT is looking at the facts as at the time of re-making the decision if, on the basis of more recent evidence, the situation in the country of origin (or the individual's circumstances) can be said to have changed.

20. In relation to the Art 15(c) issue, it would be somewhat curious, applying the approach in Adam, that the Upper Tribunal could review its final decision under rule 45 of the Upper Tribunal Procedure Rules because a subsequent country guidance decision could materially have affected the UT's final decision had it been available at the time, yet during the process of hearing an appeal, and when (having found an error of law) the UT is re-making the decision, the UT could not take into account relevant country guidance decisions decided since the error of law stage. In particular, given the three year delay between my error of law decision and the UT re-making the decision (which was caused by a combination of awaiting new country guidance decisions on the issue of documentation in Iraq and the Covid pandemic), that a finding on the country conditions in Iraq (in particular in Mosul) should remain fixed and determinative of the risk on return to the appellant in a decision to be re-made three years later.

21. I do not consider that the argument is correct that the issue can only be re-visited if the more recent decision is in the individual's favour. Of course, the UT in re-making the decision may consider that relevant but it is not determinative. The argument, akin to the Robinson obvious argument, that the UT cannot reach a decision which would put the United Kingdom in breach of its treaty obligations could be said to be significant but, in truth, the UK's treaty obligations could be observed, even if a recent favourable country guidance decision was not considered by the UT in re-making the decision, if the appellant were to make fresh submissions based upon it to the Secretary of State. The point is, therefore, not determinative in my judgment.

22. I do not accept Mr Coyte's submission that there is any unfairness to the appellant in reopening the Art 15(c) issue.

23. First, the Art 15(c) finding is preserved but only as a finding as to the circumstances pertaining in February 2019. The appellant has been on notice for some time that, as a result of submissions made by the respondent during the Covid-19 pandemic, that the Secretary of State was seeking to reopen the Art 15(c) issue in the light of the CG decision in SMO & Others published in December 2019.

24. Secondly, like the finding in relation to Art 15(c), the finding by Judge Lever that the appellant had not lost contact with his family is a preserved finding as to the circumstances in February 2019. There is no reason to set that finding aside in the light of my decision that the judge's adverse credibility finding was unassailable in law. However, like the Art 15(c) finding, it is a finding as to the circumstances at the time of Judge Lever's decision in February 2019. No evidence can be presented to undermine that finding (or indeed the Art 15(c) finding) but, for example, subsequent evidence, if admissible, as to circumstances post-dating Judge Lever's decision can be relied on in order to maintain a claim that subsequent to his decision, in fact, the appellant has lost contact with his family if that is said to be the case. In other words, both the respondent and appellant have an equal opportunity to present relevant evidence (country guidance or otherwise) post-dating Judge Lever's decision not to undermine his findings as to the position in February 2019 but in order for the UT to make relevant findings as to the position at the date of its decision re-making the decision.

25. Of course, nothing I have said affects Judge Lever's decision and findings in relation to the asylum ground. That decision and his findings in relation to it are unaffected by any error of law. There is no reason to revisit the asylum ground rejected by Judge Lever. It is based upon a legally unassailable adverse credibility finding.

26. That, in fact, is also a useful comparator to the Art 15(c) issue. The UT is engaged in re-making the decision in respect of Art 15(c) because it was accepted that the finding in relation to internal relocation and access to replacement ID documentation were live issues upon which evidence and findings had to be made. To do so on the basis of a finding grounded in now out of date country guidance as to the risk under Art 15(c) in the appellant's home area, only goes to emphasise the artificiality of the UT reaching a decision on the appellant's humanitarian protection claim without regard to the current circumstances pertaining in Mosul.

27. For these reasons, therefore, I accept the substance of Ms Rushforth's submissions. The UT will re-make the decision reaching findings on the Art 15(c) risk to the appellant in Iraq and, in particular, Mosul based upon the up-to-date country decisions in SMO & Others and SMO & KSP. That, as I understand it, means that the appellant cannot rely upon Mosul being a "contested area" any longer but that the 'sliding scale' identified in SMO & Others must be applied and appropriate factual findings made on that based upon the evidence at the resumed hearing.

28. Likewise, and to the extent that the appellant seeks to do so, he may argue based upon evidence relating to matters post-dating Judge Lever's decision, that, despite Judge Lever's finding that he had not lost contact with his family in Mosul at the time of Judge Lever's decision, that has occurred subsequently.

29. The appeal will now be relisted in order to re-make the decision.

Signed

Andrew Grubb

Judge of the Upper Tribunal
20 July 2022